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No. 87-267

In The
Supreme Court of the United States
October Term, 1987

D. H. HOLMES CO., LTD.,
Appellant,

V.

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION
THE DEPARTMENT OF REVENUE
AND TAXATION,
STATE OF LOUISIANA,
Appellee.

**On Appeal from the Court of Appeal,
Fourth Circuit,
State of Louisiana**

BRIEF OF AMICUS CURIAE MULTISTATE TAX COMMISSION IN SUPPORT OF APPELLEE SHIRLEY McNAMARA, SECRETARY, LOUISIANA DEPARTMENT OF REVENUE AND TAXATION

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QUESTION PRESENTED

The pertinent Question Presented for decision, as stated by the Appellant (Brief of Appellant, page i.) with the modification suggested by Appellee (Motion to Dismiss or Affirm, page i.) would be properly stated as follows:

> Whether provisions of Louisiana use tax law, La. Rev. Stat. §§ 47:302(A)(2) and 47:321(A)(2) are violative of the Commerce Clause, Article I, Section 8, Clause 3 of the Constitution of the United States, as applied to assess against Appellant a tax on the merchandise catalogs sent by United States Mail directly from out-of-state printers to the mailboxes of Louisiana residents, free of charge to the recipients.

PARTIES TO THE PROCEEDING

The parties to the proceeding are D. H. Holmes Co., Ltd., the Appellant, and Shirley McNamara, Secretary of Revenue and Taxation, Department of Revenue and Taxation, State of Louisiana, the Appellee.

Amicus Curiae, Multistate Tax Commission, is a state government instrumentality and has no parent company, subsidiaries or affiliates to list pursuant to Supreme Court Rule 28.1.

CONSENT

The parties have given their consent pursuant to Rule 36.2 of the Supreme Court Rules to the filing of this *Amicus Curiae* brief. Copies of the letters of consent are on file with the Clerk of the Court.

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STATEMENT OF INTEREST OF AMICUS CURIAE MULTISTATE TAX COMMISSION

The Multistate Tax Commission ("MTC") is the official administrative agency of the Multistate Tax Compact ("Compact"). Currently, the Compact has been entered into by 18 states and the District of Columbia as full members; and 10 additional states have joined the

Commission as associate members.[1] The States of Florida, Illinois, Indiana, Maine, Nebraska, Nevada, Oklahoma, and Vermont have also joined with MTC states in a special project, referred to as the MTC National Bellas Hess Project, in an attempt to address the more serious use tax collection problems that arose from the Court's decision in *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967).

The stated purposes of the Compact are to:

1. Facilitate proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.
2. Promote uniformity or compatibility in significant components of tax systems.
3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.
4. Avoid duplicative taxation.

As reflected by these four basic principles, the MTC possesses vital and continuing interests that transcend the resolution of the factual questions presently before the Court. As a result of this Court's opinions in the area of nexus for direct taxation, for use tax collection purposes, and for other aspects of a state's jurisdictional power over persons and transactions, some confusion has arisen with regard to the obligation of out-of-state direct marketers to collect the use taxes imposed by the states into which the

[1] The current full members are the states of Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Minnesota, Missouri, Michigan, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, and Washington. The associate members are the states of Alabama, Arizona, Georgia, Louisiana, Maryland, Massachusetts, New Jersey, Ohio, Pennsylvania and Tennessee.

marketer is purposefully selling its goods. It is recognized that the occasional sale or delivery of goods, without purposeful solicitation of the consumer market by the out-of-state merchant, may not create a sufficient connection with a state to require use tax collection. However, when the level of the out-of-state direct marketer's activities is beyond the occasional solicitation of sales, those activities result in substantial equivalence to those being conducted by the local merchant. Then, an exploitation of the state's market is the result.[2] That exploitation fairly justifies requiring the out-of-state direct marketer to collect the state's use tax. Therefore, the MTC finds it to be of continuing importance to present its underlying position as to the application of the Due Process Clause and the *National Bellas Hess* decision to cases such as that presently before the Court.

The MTC is concerned that the states be able to stanch the substantial current loss of use tax revenues to which they are lawfully entitled. That loss is caused by their in-

[2] It is noteworthy that direct marketing consultants recognize the parallels that occur between types of direct marketing solicitation and retail store operations. For example, one such consultant has defined the term "catalog" as follows:

> *Catalog.* This is an offer of an assortment of merchandise from which the prospect may select one or more items. The catalog may remain in force for months and sometimes for more than a year. This method of selling is applicable when there is a relatively broad assortment of items to be offered to a target audience. In the consumer sector such items are frequently of a discretionary nature, while in the industrial sector such items often represent recurring supply needs within a particular product area. *A catalog is most analogous in concept to a retail store which displays a variety of merchandise and invites customers to make selections.*

Passavant, "Direct Marketing Strategy", *The Direct Marketing Handbook* (E.L. Nash ed. 1984) at 11.

ability either to collect the tax directly from their residents or to require the out-of-state direct marketers to do so.[3] To the extent that the Court's decision in this case might negatively affect the states' efforts in this regard, the MTC desires to submit its brief to assist the Court in its exploration of the applicability of the Due Process Clause in this matter.

The states, individually through their own efforts, jointly through interstate agreements, through their shared efforts in support of pending Congressional legislation, and through joint efforts such as the MTC's National Bellas Hess Project, are attempting to develop direct responses to the serious problems addressed by this Court and, more recently, by the Advisory Commission on Intergovernmental Relations ("ACIR"). The ACIR estimates that in excess of $1,400,000,000 in use taxes annually escape collection from mail order sales due to the actual or perceived prohibition contained in the *National Bellas Hess* decision.[4]

The MTC is vitally interested in assisting the states in convincing this Court that it should substantially limit, if not completely disapprove of its prior decision in *National Bellas Hess* to the extent that its holding was premised upon the Due Process Clause. However, the

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[3] *Amicus Curiae* American Retail Federation concedes that a state's attempt to collect the use tax from the recipient of the goods (catalogs here) "would be administratively unworkable". (Brief of *Amicus American Retail Federation* at 13, n.9). Unless the out-of-state direct marketer is required to collect the use tax owed by its customers upon its sales into a state, such administrative unworkability would prevent the remittance of the tax.

[4] ACIR Report No. A-105, State and Local Taxation of Out-Of-State Mail Order Sales (April 1986), Table 2-3, pp. 30-31 as supplemented by Staff Information Report (SR-5) (September 4, 1987).

parties to this case, reasonably not anticipating any need to do so, did not develop a record upon which the Court could re-examine its *National Bellas Hess* decision in light of modern technologies in the direct marketing and computer areas. But, even despite Holmes' decision not to raise any Due Process Clause claim that would permit the Court to examine that issue; and despite the lack of a record that would have been developed for such an examination, *Amici Curiae* Direct Marketing Association and American Retail Federation now attempt to inject a Due Process Clause issue into this case.

The states' ability to require out-of-state direct marketers to collect use tax from their in-state customers rests, in substantial measure, upon this Court's current view of the validity and scope of the *National Bellas Hess* holding. Additionally, a crucial key is this Court's continuing development of its standards concerning the kind and extent of activities which are required for a state to impose personal jurisdiction over a non-resident. The reason is that such standards should apply with equal force to nexus considerations for the imposition of a use tax collection duty.

Amici Curiae Direct Marketing Association and American Retail Federation, by raising the Due Process Clause as they have, indirectly seek the Court's reaffirmation of the nexus holding adopted in the *National Bellas Hess* decision. Even though *Amicus Curiae* American Retail Federation suggests that, since Holmes collects use tax on its catalog sales, the holding in the *National Bellas Hess* case "is therefore not applicable to this case," a substantial portion of its *Amicus* brief supports the continued application of the nexus principles established in the *National Bellas Hess* case. Brief of *Amicus Curiae* American Retail Fed-

eration at 25, fn. 22. *Amicus Curiae* Direct Marketing Association, if it could convince this Court that it should decide this case in Holmes' favor upon Due Process Clause grounds or upon a reaffirmation or expansion of the nexus holding in *National Bellas Hess*, would succeed in further insulating from use taxation, as a practical matter, massive interstate sales by a large segment of its membership. That result would continue the patently unfair situation in which the in-state retailers must collect and remit the tax and suffer the substantial competitive price disadvantages that result therefrom.

In this context, it is obvious that *Amici Curiae*, including the MTC, possess interests far beyond the particular facts and outcome of this case. The Court's holding or *dicta* will either feed or dowse the flames of arguments being advanced by non-parties to this case in other arenas, such as before Congress or in the course of other litigation presently working its way through the state judicial systems. If the Court were to express its opinion here regarding the continued vitality of the *National Bellas Hess* decision or as to the extent of its application or as to the basis upon which that case was decided, that expression would affect all state taxing jurisdictions, thousands of direct marketers, and, quite possibly, decisions of Congress with regard to the pending legislation. Therefore, the MTC is vitally interested in arguing that the Court should not here address the Due Process issue, which has been raised by no one other than the *Amici*, but should defer consideration of that issue until it has the opportunity to consider a fully developed record.

However, if the Court wishes to address in this case either the Due Process Clause issue or the application of

the *National Bellas Hess* decision to the facts herein, the MTC hereby offers its arguments. Its position is that both recent technological advances and recent decisions of this Court dictate either a restriction on the applicability of the *National Bellas Hess* decision or disapproval of it.

STATEMENT OF THE CASE

D. H. Holmes Company, Ltd. ("Holmes") is a corporation organized under the laws of Louisiana and has its principal and registered office in New Orleans, Louisiana (Joint Appendix ("J.A.") 2-3, 11). Holmes is engaged in retail sales from its 13 department stores located throughout Louisiana (J.A. 68). It has in excess of 450 separate telephone listings in the greater New Orleans area (J.A. 35-37).

Through the Frederick Calkins Buying Organization, Holmes contracted for the design and printing of catalogs promoting its retail goods (J.A. 70-71). During the tax period in question, 82% of these catalogs, all of which were printed outside Louisiana, were mailed via the United States Postal Service by the printer, at Holmes' direction, to Holmes' customers residing in Louisiana (J.A. 73-74, 80-81). These catalogs were designed and intended for use in promoting Holmes' retail business; and the facts presented do not involve the operation of a mail order business or the question of whether Holmes had a duty to collect Louisiana's or any other state's use tax on any mail order sales.

Louisiana imposes a tax upon ". . . the use, the consumption, the distribution . . . in the state of each item or article of tangible personal property . . .". La. Rev. Stat. §§ 47:302(A)(2) and 47:321(A)(2). The tax at

issue here was imposed upon Holmes' use of the catalogs mailed to its Louisiana customers and measured by the cost thereof to Holmes. The Louisiana Secretary of Revenue and Taxation sought to enforce its use tax statutes by instituting an action to collect the tax from Holmes in Civil District Court of Orleans Parish. (J.A. 2-7).

The trial court sustained the assessment (Jurisdictional Statement on Appeal ("J.S.App.") 12A-15A), reasoning that the catalogs "were directed toward residents of Louisiana and were intended for the use of D. H. Holmes in increasing its sales to potential customers who are residents of Louisiana". (J.S.App. 21). The trial court found that the imposition of the tax was valid under the four-part test referred to by this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) (J.S.App. 21A-22A). The trial court's decision was affirmed by the Louisiana Court of Appeal, Fourth Circuit. *McNamara v. D. H. Holmes Co., Ltd.*, 505 So.2d 102 (La. App. 1987), *cert. den.* 506 So.2d 1224 (1987). (J.S.App. 2A-11A).

Holmes' sole federal constitutional objection to the imposition of the tax has been limited to the Commerce Clause of the United States Constitution (J.A. 11-13; J.S. App.i; Brief of Appellant (i)).

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SUMMARY OF ARGUMENT

I. RULE 15.1 OF THE SUPREME COURT RULES PRECLUDE AMICUS CURIAE FROM RAISING NEW ISSUES ON APPEAL THAT WERE NOT RAISED BY THE PARTIES.

Holmes has not, at any stage of these proceedings, raised the argument that the tax in question violates the Due Process Clause of the United States Constitution.

This argument is first raised in the *Amicus Curiae* briefs of the American Retail Federation and the Direct Marketing Association.

Rule 15.1 of the Rules of the Supreme Court limits the questions to be considered by this Court on appeal to those "set forth in the jurisdictional statement or fairly included therein." This Court has been consistently vigilant regarding the application of Rule 15.1 so as to prevent parties from raising issues that have not been properly raised or decided by the courts below. It should not allow the *Amici* to raise the Due Process issue here.

II. THE NEXUS REQUIREMENT OF THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION IS FULLY SATISFIED WHEN SOLICITATIONS OF SALES ARE PURPOSEFULLY DIRECTED BY ANY MEANS OF COMMUNICATION TO THE RESIDENTS OF A STATE.

If the Court were to consider the application of the Due Process Clause to this case or the extent to which the *National Bellas Hess* decision bears upon the issues here or even whether that decision remains good law today, several arguments should be considered by the Court in light of the vast technological advancements in the area of interstate marketing that have occurred over the past twenty years. These arguments will demonstrate that the *National Bellas Hess* decision should no longer be relied upon to prohibit the states from imposing a use tax collection duty upon the direct marketers who purposefully direct their sales solicitation campaigns into a state by mail, telephone, television, radio, computer, catalogs, newspapers, magazines or any other type of media.

The Court's decision in the *National Bellas Hess* case appears to have been based solely upon Commerce Clause considerations. This Court has suggested that, in this area, "Congress alone has the power of regulation and control." *National Bellas Hess,* 386 U.S. at 760. As such, Congress remains free to pass legislation that may allow the states to impose a use tax collection burden upon direct marketers under circumstances that Congress determines will best promote the competing interstate commerce interests at issue, so long as the legislation does not violate the Court's conception of Due Process Clause protection applicable to interstate marketers. Any decision in the context of this case to the contrary would seriously impede the efforts of the states and Congress to pursue the course which this Court has implicitly approved.

The more recent decisions of this Court in the area of personal jurisdiction, as well as with regard to taxing jurisdiction, underscore the Court's developing jurisdictional concepts concerning commercial activities that are not dependent upon the marketers' in-state physical presence. It has stated these concepts in terms of: (1) whether the commercial actor's activities are "purposefully directed toward" residents of the state, see, *Asahi Metal Industry Co., Ltd. v. Superior Court of California,* — U.S. —, 107 S.Ct. 1026, 1033 (1987) and *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 473-475 (1985); and (2) whether activities that are performed by or on behalf of the taxpayer "are significantly associated with the taxpayer's ability to establish and maintain [an in-state] market . . . for the sales." *Tyler Pipe Industries, Inc. v. Washington Department of Revenue,* — U.S. —, 107 S.Ct. 2810, 2822 (1987). Thus, in determining whether sufficient contacts

exist with a state to permit that state to impose personal jurisdiction over a party, the Court primarily focuses upon whether the party intended to enter the state in some manner. In the case of a direct marketer, the commercial actor's conduct toward the consumers of a state creates an "economic" presence, even if there is no physical presence. Holmes clearly has a substantial physical nexus in Louisiana. In addition, it has a substantial economic nexus there. Its in-state advertising, purposefully directed at Louisiana residents, is sufficient to satisfy the demands of both the Due Process and Commerce Clauses to the United States Constitution.

ARGUMENT

I. RULE 15.1 OF THE SUPREME COURT RULES SHOULD APPLY TO PRECLUDE AMICI CURIAE FROM RAISING NEW ISSUES ON APPEAL THAT WERE NOT RAISED BY THE PARTIES.

Rule 15.1 of the Rules of the Supreme Court serves to limit the questions to be decided by the Court on appeal. Rule 15.1 provides, in pertinent part, as follows:

> The jurisdictional statement required by Rule 12 shall contain, in the order here indicated:
>
> (a) The questions presented by the appeal, expressed in the terms and circumstances of the case but without unnecessary detail . . . *Only the questions set forth in the jurisdictional statement or fairly included therein will be considered by the Court.* (Emphasis supplied).

Holmes bases its appeal solely upon the Commerce Clause, Article I, Section 8, Clause 3 to the United States Constitution. (J.S. i). However, *Amici Curiae* Direct Marketing Association and American Retail Federation raise

for the first time on appeal arguments for reversal based upon the Due Process Clause of the United States Constitution, Amendment XIV, Section 1. (Brief or *Amicus Curiae* Direct Marketing Association 8 *passim;* Brief of *Amicus Curiae* American Retail Federation 8-18). At no time during the proceedings has Holmes raised the Due Process Clause as an issue to be addressed by either the parties or the lower courts. The arguments of *Amici Curiae* that the Louisiana use tax in question here violates the Due Process Clause have not been factually developed below by the parties. Therefore, such an argument should not be addressed here by the Court without the benefit of a complete record on that issue.

Amicus Curiae Direct Marketing Association would also have the Court re-affirm its decision in *National Bellas Hess* without the benefit of a fully developed record as to the true nature and full extent of the administrative burdens posed by a direct marketer's being required to collect state and local use tax. It would have the Court simply accept its assertion that "the administrative burden and expense [of collecting the use tax] would have a far-reaching effect on interstate commerce." Brief of *Amicus Curiae* Direct Marketing Association at 2. As to this issue, the Court should be permitted to view a record which includes evidence of currently available computer technology as well as evidence concerning the availability of services that address the needs of the interstate sellers with regard to sales and use tax collection and filing responsibilities.[5]

The direct marketers base their argument upon factual representations that were before the Court twenty years

[5] Computerized programs and services of various companies are now available to address, in substantial measure, the concerns of which the direct marketers complain.

ago in the *National Bellas Hess* case. Those representations were that interstate commerce would be unreasonably burdened by the imposition of a use tax collection duty upon the taxpayer in that case. *Amici* would have this Court remain unaware of the many technological advancements that have taken place over the past twenty years. They would also have the Court ignore the proliferation of service companies that provide up-to-date tax rate information support and tax return filing systems and services.

In *Irvine v. California*, 347 U.S. 128 (1954), this Court plainly expressed its disapproval of "the practice of smuggling additional questions into a case after [the granting of] certiorari. The issues . . . are fixed by the petition unless [the Court] limit[s] the grant . . .". *Id.* 129. While the "smuggling" epithet may fall a little bit harshly upon the two *Amici* here, their attempt to broaden the issues raised by the parties, if permitted by the Court, will benefit certain segments of the direct marketing industry and will disadvantage others. If the Court were to rule favorably for Holmes on either a Due Process Clause basis or on one that recognizes the continued application or extension of the *National Bellas Hess* decision, such a holding would have an impact upon litigation that is currently being developed by the states in the lower courts.[6] Additionally, were the Court to express its views on issues not

[6] For example, the case of *Bloomingdale's By Mail, Ltd. v. Commonwealth of Pennsylvania, Department of Revenue*, No. 2345 is now pending before the Pennsylvania Commonwealth Court. In that case the direct marketer, represented by the same able counsel that here represents *Amicus Curiae* American Retail Federation, has ample opportunity to raise and factually develop the Due Process and Commerce Clause issues now sought to be injected here.

raised by the parties here, it might affect the legislative process that is presently pending in Congress.[7]

Amicus Curiae Direct Marketing Association, without the benefit of a fully developed record, here argues that a direct marketer would face unreasonable burdens if it were required to collect use taxes. At the same time, the Direct Marketing Association is opposing Congressional legislation that would greatly reduce those alleged burdens.[8] The 46 sales and use tax states are supporting activities that seek either disapproval or substantial modification of the *National Bellas Hess* decision. They maintain that that decision should not be construed to prohibit the states from effectively collecting the use tax in circumstances in which the direct marketer's method of sales solicitation within the state has created an economic presence.

If the Court were to carve, on a Due Process Clause basis, catalog advertising from activities that create nexus for use tax collection purposes, would not the direct marketers then seek similar protection for other methods of sales solicitation, both on Due Process and First Amend-

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[7] *See*, H.R. 1242, H.R. 3521 and S. 1099, which would require the larger direct marketing firms to collect the use tax, so long as certain conditions were met, e.g., that the state and local rates be uniform; that the uniform rates be applied to a single state base; and that certain state and local filing requirements be reduced.

[8] *See* Hearing on S. 639 and S. 1099 before the United States Senate Finance Committee's Subcommittee on Taxation and Debt Management, held on November 6, 1987. At that hearing, Professor Lucas Powe argued that passage of those bills would result in their being held unconstitutional as violative of both of the Due Process and Commerce Clauses under the holding of *National Bellas Hess*. The states argue that such legislation would be constitutional for, among other things, the reasons discussed in this brief.

ment grounds?[9] Certainly, they would. But those questions should not be addressed in the context of this case; as they should be addressed in cases in which they have been properly raised by the parties and in which the Court has before it a fully developed record on those issues. *Amicus Curiae* American Retail Federation has underscored that the issues it here raises may impact areas that are broader than merely communicating commercial solicitations by mail. It states that:

> Senders and putative senders of interstate radio, telephone, and television communications sent by cable from one state to another my similarly be liable for use tax in each of the states in which the communication is received and through which the interstate communication passes.

Brief of *Amicus Curiae* American Retail Federation at 24.

No type of commercial speech should be exempted or protected from the analysis as to whether its use by the marketer has been sufficient to create nexus within a state for tax purposes. All types of message should be equaliy treated. The First Amendment analysis recently affirmed by this Court clearly suggests the requirement of such equality in treatment of state taxing schemes.[10]

Our nation is experiencing a shift in its economic base from manufacturing to a more service-oriented economy.

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[9] The Court's decisions in *Arkansas Writers' Project, Inc. v. Ragland*, — U.S. —, 107 S.Ct. 1722 (1987) and *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) raise some concern that a decision here that immunized catalog marketers from collection of use tax would provide a basis for similar immunity for other types of solicitation, such as television, newspaper, magazine, radio, billboard and computer messages. Clearly, the Court did not intend such a result in *National Bellas Hess*.

[10] *See Minneapolis Star & Tribune Co.*, 460 U.S. 575 (1983), and *Arkansas Writers' Project, Inc.*, — U.S. —, 107 S.Ct. 1722 (1987), *supra*, n. 9.

Technological advancements in marketing and delivery capabilities demand new judicial analyses of modern jurisdictional issues based upon well-developed factual records. For example, one significant marketing factor that has developed as recently as the early 1970's is the use of 800 number in-WATS and out-WATS telephone services that establish a vital personal link between the direct marketers and their customers. The in-WATS telephone service provides the customer with the use of the direct marketer's telephone lines to make long-distance calls to the direct marketer without charge to the customer.[11] The factual

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[11] The rapid growth of the use of this service has been described by one author as follows:

> In 1980 alone, in-WATS and out-WATS telephone expenditures by direct marketers represented a whopping $9.845 billion, or 43% of total direct marketing media expenditures. However, each of the transactions effected through WATS contact was a personal dialog between an operator or communicator representing a company's "personality" and a valued direct marketing customer.
>
> This contact can be orchestrated in several aspects, *from the insertion of motivation buttons that will stimulate the 800 customer to respond* to a carefully written order script dialog that combines the order-taking function and customer relations practices for maximum efficiency and customer development effects.

A. Caplan, "Telemarketing-Inbound", *The Direct Marketing Handbook* (E.L. Nash ed. 1984) at 392 (emphasis added). For a description of the powerful effect of the 800 number as a tool to "up-sell" the customer, this same author suggests:

> Whether the 800 number is combined with TV or print media, the "up-sell" concept works phenomenally well when the 800 center personnel are provided with the proper scripting and incentive to upgrade the sale. The person who is on your 800 line is your most qualified customer; he or she is in the purchase sequence and is obviously interested in your product. It is a relatively simple task to convert a book order into a deluxe edition order or a 1-year subscription into

(Continued on following page)

record in this case is not one that fairly permits resolution of the issues raised by *Amici;* and the Court should not accept *Amici's* invitation to rule on those issues. Its doing so, if it ruled in favor of the direct marketers, could have a devastating effect upon the revenues of the states and upon the businesses of competing in-state retailers.

II. THE NEXUS REQUIREMENT OF THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION IS FULLY SATISFIED WHEN SOLICITATIONS OF SALES ARE PURPOSEFULLY DIRECTED BY ANY MEANS OF COMMUNICATION TO THE RESIDENTS OF A STATE.

Amicus Curiae MTC recognizes that Supreme Court Rule 15.1 is not applied with inflexibility. *Cf., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); and that the Court is free to affirm the decision of the Louisiana Court of Appeal below "on any ground that the law and the record will permit and that will not expand the relief granted below." See, *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984). Therefore, the following represents a brief discussion of the extent to which the Due Process Clause should be applied to support affirmation of the ruling below.[12]

(Continued from previous page)

> a 2-year subscription. By many accounts, an up-sell can be accomplished on 25 to 30 percent of the 800 orders.

Id. at 411.

[12] This brief has been prompted solely by the attempt of the *Amici* marketers to broaden the issues; and it would not have been filed had that attempt not been made. It leaves to the good hands of the parties directly in interest the development of those Commerce Clause issues that have been properly raised. For an excellent Commerce Clause analysis with respect to the mail order industry, see McCray, *Commerce Clause Sanctions Against Taxation on Mail Order Sales: A Reevaluation*, 17 Urb. Law. 529 (1985).

Over thirty years ago, Paul Hartman, now Professor Emeritus, Vanderbilt University, suggested that new methods of marketing goods require that the Supreme Court develop new approaches regarding its concept of "nexus" in the area of interstate sales. He stated:

> With great expansion of ways of merchandising vastly different from those when the Court developed many of its ideas of due process, perhaps there should be a revamping of the notion of what constitutes sufficient "nexus" to satisfy due process, as well as what the commerce clause will permit by way of state taxation. Should not the exploitation of a state's markets for the capture of profits be enough for that state to demand something in return, thus satisfying the requisites of the due process clause? Several hundred travelling salesmen, no matter how avidly they hawk their wares, are not nearly as effective a "nexus" for an exploitation or invasion of a consumer market as a Dinah Shore or a Pat Boone as they croon their sponsor's products into the hands of thousands of purchasers on interstate television and radio. Is the state of market to be denied a tax from either the out-of-state seller or the broadcasting company because the contacts of such out-of-state sellers and broadcasters are ethereal only? Or, should a well known milk company be permitted to milk the consumer market with the sonorous singing of ballads by hillfolk and western singers without paying its tithe to the state of market on the ground that the interstate radio and television milking process is too ethereal?[13]

Professor Hartman has again, more recently, expressed this view in his treatise on the subject of state and local taxation. Professor Hartman states that:

> Benefits from the taxing State, unrelated to physical contact with the State, may be of vastly greater sig-

[13] Hartman, *State Taxation of Corporate Income From A Multistate Business*, 13 Vand. L. Rev. 21, 43 (1959).

> nificance than those derived from the presence of a whole swarm of drummers soliciting business. Practically speaking, it is hardly essential to the existence of a nexus with the taxing State that there must be personnel, directly engaged in some form of physical activity within the State in furtherance of a business purpose. *The connection between the taxing State and the out-of-state collector-seller to establish nexus should be an economic rather than a physical relationship. When the out-of-state seller takes advantage of the economic milieu within the taxing State for the purpose of realizing a profit, a sufficient nexus to require the seller to collect the use tax could be found.* (Emphasis supplied).[14]

In the *National Bellas Hess* case, the Illinois statute requiring use tax collection was not held unconstitutional on its face; but it was determined to be unconstitutional as applied to the facts of the case—two bulk mailings into Illinois, followed by the occasional mailing of flyers and the delivery by mail or common carrier of the goods purchased. The Court did not rule upon any other type or degree of interstate solicitation than that presented by the facts before it. There the Court was primarily concerned about the effect upon interstate sellers of the "many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements." *National Bellas Hess*, 386 U.S. at 759. It was those concerns that led the Court to find, on Commerce Clause grounds, that Illinois' attempt to apply its statute to National Bellas Hess violated the purpose of the Commerce Clause "to ensure a national economy free from such local entanglements." *Id.* at 760. The official syllabus of the case that

[14] P. Hartman, *Federal Limitations on State and Local Taxation*, 631 (1981). *See also*, Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales*, 39 Vand. L. Rev. 993 (1986).

was prepared by the Reporter of Decisions for the Supreme Court opinions, while not controlling, clearly states that the Court's decision was based upon the Commerce Clause, no mention of the Due Process Clause; and no mention appears in the syllabus. In the *National Bellas Hess* case, the syllabus states, in pertinent part, as follows: "Held: The *Commerce Clause* prohibits a State from imposing the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or by mail." *Id.* at 753 (emphasis added).[15]

The Court appears to have based its *National Bellas Hess* ruling upon the Commerce Clause, and not the Due Process Clause. However, given the discussion of the Due Process Clause in that case and *Amici's* raising it, we address those concerns here.[16]

The recent direction taken by the Court in the area of personal jurisdiction is most instructive. That direction should be viewed for guidance as to the Due Process Clause standards that are to be applied to determine whether interstate marketers may be required to collect a state's use tax.[17] *Amici Curiae* Direct Marketing Asso-

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[15] *See also* J. Hellerstein, *State Taxation* (1983) at 226, at which it is stated that the Supreme Court's *National Bellas Hess* holding was based upon Commerce Clause language.

[16] For a discussion of the inappropriateness of even relying at all upon the Due Process Clause as a basis for striking down a state tax scheme in lieu of or in addition to the Commerce Clause, *see Central Railroad Co. of Pennsylvania v. Pennsylvania*, 370 U.S. 607, 619 (1962) (Douglas, J., concurring).

[17] For a comprehensive analysis of the Court's decisions in this area and a description of its developing Due Process standards in the areas of personal and tax jurisdiction, *see* McCray, *Overturning Bellas Hess: Due Process Considerations*, 1985 B.Y.U. L.Rev. 265.

ciation and American Retail Federation choose to ignore the revolutionary manner in which business enterprises currently conduct their interstate activities. But this Court has recently considered such developments in deciding the reach of the states' personal jurisdiction. Recent cases, such as *Tyler Pipe Industries, Inc.*, 107 S.Ct. 2810 (1987); *Asahi Metal Industry Co., Ltd.*, 107 S.Ct. 1026 (1987); *Burger King Corp.*, 471 U.S. 462 (1985); and *Hustler Magazine, Inc. v. Keeton*, 465 U.S. 770 (1984), when considered along with the watershed case of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), create a new set of analytical tools with which to labor in the area of nexus determinations.

This Court's decision in *Complete Auto Transit* made it clear that even direct state taxation of interstate receipts does not violate the Commerce Clause of the Constitution when such activity has a sufficient connection with the state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the benefits provided the taxpayer. *Id.* at 279. When viewed under this standard, the marketer that purposefully directs its commercial sales solicitations at a state's consumer base by any means may be held accountable to the extent of collecting applicable use tax. Evidence that will bear on whether the out-of-state marketer has purposefully availed itself of the state's consumer market base will often be reflected by the regularity of in-state solicitation, the systematic method by which the marketer identifies and targets its customers, the extent of credit checks and issuance of credit for sales, the methods selected for delivery or receipt of communications and delivery of goods or ser-

vices, the extent and nature of continuing contacts created with the consumers, and the like.[18]

The nexus standard proposed here is consistent with the principles adopted by the Court in both *General Trading Co. v. State Tax Comm'n*, 322 U.S. 335 (1944), and *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954). The consistency between the Court's holdings in the *General Trading Co.* and *Miller Bros.* cases with that of a nexus standard that requires a purposeful direction of commercial activities (often evidenced by regular or systematic solicitations directed at in-state residents) is evident from Justice Jackson's distinguishing in *Miller Bros.* of the

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[18] One primary goal of the direct marketer is the creation of a continuity of contact and relationship with the in-state customer. A few of the more obvious methods of creating that kind of a relationship are accomplished through the development of catalogs and other written devices that continually pour into the home; the pre-approval or easy availability of credit; free trials; and the providing of toll-free 800 WATS telephone numbers to the customer. But other, more subtle attempts are used to create an on-going relationship that will produce future sales; e.g., contractual guarantees being provided the customers; an endless variety of marketing methods involving continuity programs, such as subscriptions, automatic shipment plans, club plans and the like. As recognized by one author in the direct marketing field:

> The most successful mail-order proposition generally involves the establishment of a customer relationship which extends beyond the initial transaction. Continuity is one of the most critical, and unfortunately most neglected, aspects of the direct marketing profitability equation.
>
> A retailer can establish good customer relationships by providing the service, quality, and environment to support the simple invitation "Come again." A catalog marketer accomplishes repeat sales in the same manner, except that the marketer's image is created by the catalog and service facility.

E.L. Nash, *Direct Marketing Strategy, Planning and Execution* at 64 (1982).

Court's holding in *General Trading*. Justice Jackson, in speaking for the 5-4 majority explained as follows:

> The nearest support for Maryland's position is *General Trading Co. v. State Tax Comm'n*, 332 U.S. 335. The writer of this opinion dissented in that case and, whether or not in so doing he made a correct application of principles of jurisdiction to the particular facts, it is clear that circumstances absent here were there present to justify the Court's approval of the liability for collecting the tax. That was a case of an out-of-state merchant entering the taxing state through traveling sales agents to conduct continuous local solicitation followed by delivery of ordered goods to the customers, the only nonlocal phase of the total sale being acceptance of the order. Probably, except for credit reasons, acceptance was a mere formality, since one hardly incurs the cost of soliciting orders to reject. *The Court could properly approve the State's decision to regard such rivalry with its local merchants as equivalent to being a local merchant. But there is a wide gulf between the type of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising.*

Miller Bros. at 346-347 (emphasis added).

The *Tyler Pipe* case held, in part, that the activities of independent contractors created nexus over the taxpayer. This is not a new proposition in the sales and use tax area. See *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960). But in *Tyler Pipe*, the Court approved the following statement by the Washington Supreme Court regarding nexus: "As the Washington Supreme Court determined, 'the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales.' " *Tyler Pipe*, 107 U.S. at 2822.

The above-quoted language sheds bright light on the Court's modern approach to nexus questions, especially in view of its rulings with respect to issues of personal jurisdiction. The Court has early on determined that the jurisdiction to tax a person is closely associated with the judicial jurisdiction of the state over that person. In the early case of *Shaffer v. Carter,* 252 U.S. 37, 49 (1920) the Court held that "[g]overnmental jurisdiction in matters of taxation, as in the exercise of the judicial function, depends upon the power to enforce the mandate of the State by action taken within its borders, either *in personam* or *in rem* . . . ."

Given the more recent decisions by this Court that extend personal jurisdiction Due Process Clause concepts to apply to those that "purposefully direct" their marketing efforts into a state, the issue of whether a state acquires nexus for use tax collection purposes over those out-of-state marketers is becoming ripe for review by the judiciary. The resolution of that issue, when considered in light of modern marketing techniques and the ability to respond by computer to added record-keeping requirements, should be in favor of allowing the states to extend the imposition of the use tax collection obligation to sellers who purposefully seek to exploit a state's consumer base.

In *Hustler Magazine, Inc.,* 465 U.S. 770 (1984), a libel action, this Court held that the defendant magazine publisher was subject to personal jurisdiction in a state in which its only contact was the circulation of its magazines that had been aimed at a nationwide audience. In *Burger King Corp.,* 471 U.S. 462 (1983), the Court clearly recognized that *physical* presence is not a prerequisite for personal jurisdiction. It stated that:

> Jurisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.

Id. at 476.

The Court, in *Asahi Metal Industry,* 107 S.Ct. 1026 (1987), held a foreign manufacturer not to be subject to suit in the U.S. on the facts presented; but it re-enforced its position that jurisdiction will rest upon a substantial connection being created by a defendant's action that is purposefully directed toward the forum state. What is additionally instructive about this case is found in Justice Brennan's concurring opinion, in which Justices White, Marshall and Blackmun joined. These four Justices would find personal jurisdiction consistent with Due Process notions upon a defendant's *awareness* that the stream of commerce may or will eventually deliver its product into the forum state. Justice Brennan stated:

> The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit.

> *A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity. The benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State.* Accordingly, most courts and commentators have found that jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause, and have not required a showing of additional conduct.

Id. at 1035-1036 (emphasis supplied).

By reason of its overwhelming physical contacts with the State of Louisiana, Holmes was subject to the taxing jurisdiction of the state under traditional notions of Due Process. Additionally, even if one were to isolate the sending of its catalogs into Louisiana from its other activities, Holmes, without question, purposefully availed itself of the opportunity to solicit further business from its Louisiana customers through its use of its catalogs. The fact that its catalogs were sent into Louisiana at its direction from a point outside the state "does not permit [Holmes] to escape the burden which [Louisiana] has exacted as a price of enjoying the full benefits flowing from its aggregate [Louisiana] business." *Cf., Nelson v. Montgomery Ward*, 312 U.S. 373, 375 (1941); *see also National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 561 (1977). Finally, this Court stated in *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 436 (1980) where the Court considered state corporate income tax and nexus issues in the context of a unitary business operation being conducted partly in Vermont:

> The requisite 'nexus' is . . . supplied if the corporation avails itself of the substantial privilege of carrying on business within the state . . . and . . . [t]he fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between a tax and transactions within a state for which the tax is an exaction. *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1959).

Id. at 436-7.

Holmes' attempt to divorce its delivery of catalogs to its Louisiana customers from the rest of its retail operation is without foundation in law or fact. Here, Holmes' delivery of catalogs was intended for the promotion of its Louisiana retail business. The fact that the catalogs were printed outside Louisiana should have no bearing on the nexus that was created by their delivery and use inside Louisiana or the nexus that had already been established by virtue of Holmes' being domiciled there.

CONCLUSION

The great changes that have taken place over the past several decades with respect to our country's economic base and the channels of distributing goods and services from point of manufacture to point of sale require us to move from traditional ways of approaching many state tax issues. Given modern methods of selling and delivering goods and services, many businesses find it more advantageous to deal through the mails or other means of communication than to maintain a physical presence within a state. Face-to-face selling is expensive; and, therefore, to the extent that there are less expensive marketing alternatives, that method is fading from the retail business scene. The direct marketing approach succeeds,

in part, because it is at a distance from the buyer and is not dependent upon the overhead required to operate in the retail store setting, i.e., a sales force, inventory, store, fixtures, and warehouse. The direct marketing industry is experiencing tremendous growth, in large measure, at the expense of the in-state store-bound retailer. The economic disadvantages bear heavily upon the in-state retailer. A tax differential of 5% or so can be a business killer for the "Main Street" retailer and, correspondingly, a reason for celebration by the out-of-state marketer.

The basic Due Process Clause notions of fairness and fair warning are satisfied when the out-of-state seller purposefully directs its activities toward a state for the purpose of marketing its goods and services there. The current development of Due Process standards for personal jurisdiction is analogous to that for taxing jurisdiction. The reasoning found in cases such as *Tyler Pipe*, 107 S.Ct. 2810 (1987), *Asahi Metal Industry*, 107 U.S. 1026 (1987), *Burger King Corp.*, 471 U.S. 462 (1985), and *Hustler Magazine, Inc.*, 465 U.S. 770 (1984) should be applied here in the Court's crafting of Due Process Clause standards with regard to the nexus required for use tax collection purposes.

The proper balancing of the interests of the out-of-state marketer, the state and its residents will best be accomplished by affirming the judgment below; and by doing so on grounds that permit the state to effectively impose a use tax collection duty upon all who purposefully avail themselves, by any means of communication, of the benefits of the state's market. To the extent that this proper balance can only be achieved through disapproval or modification of the decision in *National Bellas Hess*, *Amicus*

Curiae Multistate Tax Commission urges this Court to do so either here or in a case in which the record is more fully developed as to that issue.

The judgment below should therefore be affirmed on the basis that Louisiana's imposing of use tax on the catalogs here in question complies fully with Due Process and Commerce Clause requirements.

Respectfully submitted,

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